UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
U.S. ARMY TRAINING	)	
CENTER AND FORT JACKSON	)	**Docket No. CAA-04-2001-1502**
	)	
Respondent	)	
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RESPONDENT'S POST-HEARING BRIEF

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RESPONDENT'S POST-HEARING BRIEF

This matter arises under Section 113(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7413(d). The Complaint alleges in four counts that Respondent, U.S. Army Training Center and Fort Jackson ("Respondent" or "Fort Jackson") violated (1) 40 CFR § 61.145(b) by failing to provide notice to the South Carolina Department of Health and Environmental Control of Respondent's intention to conduct a renovation prior to such renovation; (2) 40 CFR § 61.145(a) by failing to thoroughly inspect for the presence of asbestos prior to the commencement of the renovation; (3) 40 CFR § 61.145(c)(8) by failing to have personnel trained in compliance with the asbestos NESHAP regulations during the renovation; and (4) 40 CFR § 61.145(c)(6)(i) by failing to adequately wet the regulated asbestos containing material (RACM) from the commencement of the renovation until it was properly collected and contained or treated in preparation for disposal. The Respondent answered the Complaint admitting the alleged violations and requesting a hearing. The Respondent contests the proposed penalty of $85,800.00. In addition, as asserted in a motion presented on the record during the hearing (Tr. 2:75, as preceded by the exchange of positions and judicial inquiry documented at Tr. 14—20),

the Respondent again asserts that Complainant failed to present a *prima facie* case, and in accordance with Rule 22.20(a), the Respondent urges dismissal of the Complaint due to a failure to establish that the Administrator made the requisite determination to proceed, as required by 42 U.S.C. § 7413(d)(1)[1].

I.

Proposed Findings of Fact

The respondent in this case is the United States Army Training Center and Fort Jackson (Fort Jackson), located at Fort Jackson, South Carolina. Fort Jackson has two primary missions: training and maintenance. The training mission of Fort Jackson is to take young men and women, train them in the basics of combat, motivate them, ensure that they have an appreciation for the core values of the service, and that they are prepared to assume their role in the field Army. Tr. 2:80.[2] The maintenance mission is to be responsible for everything that sits on top of the ground or runs underneath and is the responsibility of the Garrison Commander. Tr. 2-81, 83.

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[1] The Clean Air Act, at 42 U.S.C. § 7413(d)(1), specifies that for a case in which the alleged violation(s) occurred more than twelve months prior to initiation of a civil penalty assessment action, there must be a joint appropriateness determination by the Administrator and the Attorney General. This is a statutory requirement and thus a jurisdictional requirement. Respondent concedes this is a delegable duty, and documentation establishing the Attorney General's duly authorized official, as specified in Complainant's Exhibit 5 is not challenged since 28 C.F.R. Subpart M § 0.65a, Litigation Involving Environmental Protection Agency, clearly establishes a delegation from the Attorney General to a subordinate within the Department of Justice. However, despite the fact that the ALJ in the pending case ordered the Complainant to furnish proof of delegation, the Complainant failed to produce any evidence demonstrating action by the Administrator to delegate authority to a subordinate official. This will be further argued in Respondent's brief, but the point is that although the Complainant did file supplemental documentation, i.e., excerpts from an *EPA Delegation Manual* along with a declaration from the Associate Director of the Federal Facilities Enforcement Office, there is still no evidence of record establishing a proper delegation of authority originating from the Administrator, i.e., no document signed by the Administrator, and unlike the referenced DoJ delegation set forth in the *Code of Federal Regulations*, no rulemaking action by the Administrator or any other evidence to document a proper delegation of authority consistent with the law of agency.

[2] The transcript of the hearing held February 20 and 21, 2003 was prepared separately for each day of the hearing. It is cited herein as "Tr." with the pages for the transcript for the second identified with "2:," *e.g.* 2: 100.

The United States Army Training Center and Fort Jackson consists of a headquarters element with a Commanding General and a Chief of Staff. Tr. 2:83. There are three brigades, known as the First Brigade, the Fourth Brigade, and the Victory Brigade. Tr. 2:83, 84. The other major subordinate organization is the Garrison Command, which is organized into a number of directorates. Tr. 2:84. In 1997, at the time of the violations, there were 13 directorates, including Civilian Personnel, Adjutant General (military personnel), Morale Welfare and Recreation (MWR), Safety, Resource Management, Public Works, Logistics, and a Law Enforcement Agency. Tr. 2: 84-85. It was the responsibility of the Directorate of Public Works to sustain, restore and modernize the infrastructure. Tr. 2:85.

The Garrison Command has since been reorganized, the most significant change being the combination of the Directorate of Logistics (DOL) and the Directorate of Public Works (DPW) into one directorate known as the Directorate of Logistics and Engineering (DLE). Tr. 2-85.

A number of other organizations operate on Fort Jackson, which are not subject to the command and control of the Fort Jackson Commanding General. Tr. 2-81. They have separate chains of command and are referred to as "tenants." Tr. 2: 81. For example, there are three Army Reserve Centers, the Soldier Support Institute, the U. S. Army Chaplain Center and School, the Department of Defense Polygraph Institute, a U.S. Army Medical Department Activity, a U.S. Army Dental Activity, the commissary operated by the Defense Commissary Agency, and the Post Exchange operated by the Army and Air Force Exchange Service. Tr. 2:82-83. These "tenants" however generally do not pay rent or reimbursement to Fort Jackson. Tr. 2:99. Funding for support of these "tenants"

is included in the overall base operations budget received by Fort Jackson. Tr. 2:99. If there is a funding shortfall, Fort Jackson cannot make any assessment against any of these tenants. Tr. 2: 99-100.

The annual budget allocation for Fort Jackson base operations is generally in the $80 million range. Tr. 100. However, after stripping out civilian pay, existing contracts, supplies and equipment, there remains what is referred to as the sustainment, restoration and modernization budget, which is roughly 8 percent of that $80 million total. Tr. 100. The actual discretionary income that Fort Jackson has in that roughly $8 million slice is between $2 and 3 million. Tr. 2:100. Fort Jackson expects the discretionary amount to be $2.9 million this year (2003). Tr. 2:100. Instead of selling products or services to obtain operating funds, Fort Jackson establishes its requirements and provides them to its next higher headquarters, U.S. Army Training and Doctrine Command (TRADOC). Tr. 2:101. TRADOC then sends its requirements forward to the Department of the Army. Tr. 2:101. At the Department of the Army level there is a series of programmatic groups that discuss and negotiate the different elements of the Army's budget, which is then included in the President's budget that goes to Congress. Tr. 2:101. Congress then appropriates funding for the Army and allotments are sent to subordinate commands. Tr. 2:101. The base operations requirements of Fort Jackson "tenant" organizations are taken into consideration in preparing Fort Jackson's budget request. Tr. 2:101. In recent years, Fort Jackson has not received in its budget allotments all of the funds requested. Tr. 2:102. The Army has taken an effort to identify standard levels of service to provide each installation. Tr. 2:102. However, the Fort Jackson allotments have only been 30 percent of what the Army has indicated that standard level of service requires. Tr. 2:102. For

engineering, maintenance and repair, Fort Jackson is at the 38 or 39 percent of what the Army recognizes as its level of service. Tr. 2:102. For fiscal year 2003,[3] Fort Jackson had not yet been given its budget for the year at the time of the hearing in this matter, five months into the fiscal year. Tr. 2:103. Instead, Fort Jackson has been receiving monthly allotments to cover minimal operating expenses. Tr. 2:103. Fort Jackson expects to receive $80.7 million for fiscal year 2003, which will be inadequate to meet its needs. Tr. 2:104. At the recent rate of funding, Fort Jackson has continued to fall behind in necessary maintenance and repair, and presently has a backlog in excess of $100 million. Tr. 2:104. Any penalty assessed in this matter would probably be paid from the discretionary dollars available for sustainment, restoration, and modernization. Tr. 2:105. It is unlikely that TRADOC would allot any additional funds to pay any penalty. Tr. 2:105. The imposition of a monetary penalty, depending on the amount of the penalty, would have the effect of deferring one or more of the backlogged renovation and maintenance projects. Tr. 2:106. The deferred project may not make it back above subsequent cut lines. Tr. 2:130. The most likely consequence is the deferring of a project that affects the health and safety of the soldiers in training. See Tr. 2:106-110, 130. For example, Fort Jackson recently received guidance from a higher headquarters to "un-fund" a lightning protection shelters project for the protection of soldiers in order to fund repair of the reception battalion barracks, which is in a disgraceful condition. Tr. 2:107-110.

The Commanding General of Fort Jackson reports to the Commanding General of the U.S. Army Training and Doctrine Command (TRADOC)[4] located at Fort Monroe,

[3] U. S Government fiscal year is the period 1 October to 30 September.
[4] This is one of the Army's major commands, or MACOMs, commanded by a four-star general officer.

Virginia, Tr. 2:79. TRADOC is responsible for the development of training programs and the conceptual development of emerging material and equipment. Tr. 2:79. In 1996 Colonel Scott Nahrwold assumed command as the Garrison Command of Fort Jackson. Tr. 2:78. The Garrison Commander position is roughly equivalent to that of a city manager. Tr. 78. Colonel Nahrwold was reassigned in 1998, later returning to Fort Jackson as the Chief of Staff in 2000, and retiring from active military service in 2002. Tr. 2: 87, 94-96. He was subsequently hired as the civilian Deputy Garrison Commander at Fort Jackson. Tr. 2:96.

Fort Jackson comprises over 52,000 acres and more than 1,000 buildings,[5] involving between 9 and 10 million square feet. Tr. 2:97. There are roughly 3,500 permanent party soldiers assigned to Fort Jackson and an average of 7 to 11 thousand soldiers in training. Tr. 97-98. In addition, there are roughly 3,800 civilian employees employed by Fort Jackson. Tr. 98. A number of these soldiers and employees are not under the Command and Control of the Fort Jackson. Tr. 2:98. Fort Jackson manages and is responsible for electrical distribution, water, sewer, and heating and cooling. Tr. 2:99.

Fort Jackson receives its funding, an allotment, from TRADOC by means of a financial allocation document, called a FAD. Tr. 2-80. TRADOC in turn receives its funding allotment from the Department of the Army. Tr. 2:80. The Department of the Army is funded by Congressional appropriations. Tr. 2:80.

In March of 1997, the TRADOC commander, General William Hartzog, visited Fort Jackson. Tr. 2:112. During that visit, Colonel Nahrwold took General Hartzog on a

[5] Scott Nahrwold advised Respondent's counsel after the hearing that he mistakenly added in the number of family quarters, forgetting there are often 4 quarters in a building, so the actual total number of buildings is closer to 1,000 than the 2,200 indicated in his testimony.

tour of several facilities to apprize him of the condition of the installation barracks and to seek his support for additional funding, roughly $4.4 million worth to refurbish them, including the replacement of floor tiles. Tr. 2:113. In response to General Hartzog's inquiry about missing floor tiles, he was advised that only absolutely loose floor tiles could be removed and replaced. Tr. 2:114. At that time Fort Jackson would permit unit personnel to dispose of floor tiles that were intact and had in fact worked themselves loose from the floor mastic. Tr. 2:114. The guidance was one could use no means to remove the floor tile or to help it/assist it from coming up, but if you had loose tile, for safety purposes, the instructions were to put it in the bags, which were supplied. Tr. 2:151. The bags were then to be delivered to the "U-Do-It Center" and placed in the drums. Tr. 2:151-152. Small quantities of replacement tiles, up to ten, were available at the U-Do-It Center. Tr. 2:152. The U-Do-It Center was not able to issue large quantities of floor tile. Tr. 2:153.

In March 1997, the unit occupying building 5422 was preparing for an annual competition among dining facilities known as the Connelly Award. Tr. 2:117. The award is presented for dining facility excellence, which includes not only operations but also the appearance of the dining facility. Tr. 2:117. Although the Fort Jackson Command encouraged such participation, it was not particularly interested in focusing resources or directing activities in support of their effort. Tr. 2:117-118. The Fort Jackson Command had no immediate intention of replacing the floor tile in the dining facility in building 5422. Tr. 2:118.

If a unit wanted to replace the floor tile in a building, it would have to bring it to the Command's attention and the proposed project would have competed for funding

within the criteria established for identifying those projects against which the Command would place its discretionary dollars. Tr. 2:119. The unit occupying building 5422 did not do so. Tr. 2:119. In addition, prior to commencing any project, every proponent of a project was required to complete a "record of environmental consideration" (REC). Tr. 2:154. It was then submitted to the Environmental Management Office (EMO), for review and preparation of a Memorandum of Environmental Approval. Tr. 2:154, 156.

At some time in March 1997, the unit occupying building 5422 approached the Director of Public Works (DPW), Lieutenant Colonel Kevin Wall, and ask what they could do to improve the physical appearance of their facility. Tr. 2:122. Lieutenant Colonel Wall briefed the executive officer of the battalion occupying building 5422 as to the proper procedures for using soldiers to remove loose floor tiles. Tr. 2:116, 122. Lieutenant Colonel Wall thought he left the executive officer with a clear understanding of what could and could not be done. Tr. 2:122. In his explanation to Colonel Nahrwold, he indicated that he had explained that if there were any loose non-friable tiles that fit earlier descriptions of what soldiers could and could not do with regard to self help in this area. Tr. 2:122. No permission to go beyond existing policy was given. Tr. 2:122. However, this guidance was apparently misunderstood or inadequately conveyed to unit noncommissioned officers who were supervising the detail of soldiers in training. Tr. 2:116-117.

As stipulated by the Respondent, on March 19, 1997, Fort Jackson soldiers began removing approximately 5,600 square feet of floor tile from a dining hall in building 5422 at Fort Jackson. Some of the floor tile, which was removed from Building 5422 on

March 19, 1997, and March 20, 1997, was Category 1 nonfriable asbestos containing material as that term is defined in 40 C.F.R. § 61.141.

On Wednesday afternoon, March 19, 1997, Mr. Ed McDowell in the Fort Jackson Environmental Management Office (EMO) received two telephone calls: one from Contracting Officer Ms. Brown and one from the food service contractor, Mr. Lee. Tr. 2:144. They both informed him that some soldiers had removed floor tiles in one of the mess halls. Tr. 2:144. This was the first time that Mr. McDowell knew any such removal was intended. Tr. 2:144. Mr. McDowell then proceeded to building 5422 and observed that substantial floor tile had been removed and there were a number of bags on a stake-bed truck. Tr. 2:145. Since no work was being performed, Mr, McDowell did not feel it necessary to tell anyone to stop. Tr. 2:145. He then returned to his office and recommended to his superior, Mr. Burghardt, that samples be taken to determine whether there was an asbestos violation. Tr. 2:145. The engineers responsible for contracting for projects arranged for a contract. Tr. 2:146. On March 19, 1997, an asbestos assessment contract was awarded to AAA Environmental. Complainant's Exhibit Ex. 2. Mr. McDowell intended to inform the state regulatory agency, the South Carolina Department of Health and Environmental Control[6] (SCDHEC), of the potential violation, but he did not immediately do so because he intended to wait until they had received the expedited results of the samples collected so that when they informed SCDHEC they would know whether the soldiers had disturbed asbestos or not. Tr. 2:146.

On March 20, 1997, Mr. Mark Fairleigh, a SCDHEC employee responded to an

[6] Since October 16, 1976, the South Carolina Department of Health and Environmental Control (SCDHEC) has implemented the Asbestos NESHAP in South Carolina under delegation from the Environmental Protection Agency.

anonymous complaint regarding suspected activities involving regulated asbestos materials being held at the U-Do-It Center at Fort Jackson. Tr. 36. At the U-Do-It Center Mr. Fairleigh observed suspect floor tile located in drums. Tr. 37. There were four 55 gallon drums were for the most part full. Tr. 2:147-148. After observing the floor tile, Mr. Fairleigh contacted the Fort Jackson Environmental Management Office and was met by Messrs. McDowell and Burghardt. Tr. 37, 2:147. They told Mr. Fairleigh that without going through the appropriate approval process and contrary to Fort Jackson requirements, the soldiers had removed floor tile in one of the dining facilities. Tr. 2:147. Mr. Fairleigh was advised that Lieutenant Colonel Wall was somehow involved in the initiation of the removal of the flooring materials and that he was with the Public Works office. Tr. 38, 84, 85. They then escorted him to the dining facility in building 5422. Tr. 37, 39, 2:148. At the dining facility, Mr. Fairleigh observed that floor tile had apparently been removed. Tr. 40. Mr. Fairleigh recommended that the dining facility be shut down. Tr. 43. Mr. Fairleigh made no further recommendations at that time. Tr. 54, 86, 87. After inspecting the dining facility, Mr. Fairleigh observed suspect floor tile in bags on the back of a truck. Tr. 46. [look at Judge's questions on Tr. pp. 48-50 – fact done with hand tools may reduce exposure as opposed to power tool removal – at least in the Judge's mind] Mr. Fairleigh was advised that the suspect floor tile had been sampled, but the results were not yet available. Tr. 52. Removal activity had stopped by the time of his inspection Tr. 86.

After this visit by Mr. Fairleigh, Lieutenant Colonel Wall called Colonel Nahrwald and advised him of the inspection by Mr. Fairleigh. Tr. 2:116. Colonel Nahrwold was unaware of any intent to replace the tile in building 5422. Tr. 2:119.

Colonel Nahrwold immediately briefed the Commanding General who was shocked and outraged. Tr. 2:119. The Commanding General's immediate reaction was to relieve Lieutenant Colonel Wall. Tr. 2:119.

On March 21, 1997, Mr. Fairleigh had a telephone discussion with Lieutenant Colonel Wall advising him to basically secure the site and determine whether the material was asbestos containing material. Tr. 53, 54, 88. There was no direction given to keep the material wet. It was determined that an asbestos abatement contractor would be brought in to secure the waste in the truck and determine whether the material was regulated. Tr. 53. The same day Fort Jackson contracted with D&H Associates for asbestos abatement and air quality monitoring and monitoring began. Complainant's Exhibit 2. The contractor came in and barricaded the area, put plastic containment over the back of the truck containing bags and initiated air sampling. Tr. 2:148. The air sampling indicated there were no fibers above the OSHA standard. Complainant's Exhibit 2; Tr. 2:148. Verbal confirmation of the results of the samples taken by AAA Environmental on March 19 was received on March 21, 1997. Complainant's Exhibit 2. A total of ten samples were collected, six of the floor tile and four of the mastic. Tr. 2:149. One of the tile samples was positive for asbestos and the other five were negative. Tr. 2:149. The mastic samples were positive for asbestos. Tr. 2:149. Fort Jackson advised SCDHEC that the results indicated that 25 to 50% of the tiles were asbestos containing material as well as the mastic. Complainant's Exhibit 2. According to EPA's expert, Mr. Ripp, the validity of the tests are questionable and the amount of asbestos containing material is unknown, but it is fairly likely that the NESHAP threshold amount was exceeded. Tr. 150 – 151; 2:176 - 178.

On March 24, 1997, SCDHEC employee Jeffrey DeLong conducted another inspection of the facility. Complainant's Exhibit 1. He met Mr. McDowell and other Fort Jackson personnel at building 5422. Tr. 2:150. Mr. DeLong observed that the majority of the removed floor tile was located inside a truck secured with polyethylene sheeting and duct tape. Complainant's Exhibit 1. He then proceeded to examine the dining facility. Complainant's Exhibit 1. He was advised by Mr. Robert Davis of D&H Associates that the heating, ventilating and air conditioning (HVAC) system was left running during the removal of the floor tile. Complainant's Exhibit 1; Tr. 60. The contractor had constructed a mini-containment structure next to the truck. Tr. 2:150. Mr. DeLong examined the material on the truck and determined that it was regulated asbestos containing material, *i.e.* that it was friable. Complainant's Exhibit 1; Tr. 56, 2:150. He suggested that wipe samples be taken from various locations within the dining facility and adjacent kitchen to assess the extent of asbestos contamination. Complainant's Exhibit 1; Tr. 2:150. Thirty-two wipe samples were taken and no asbestos contamination was detected. Complainant's Exhibits 1, 2; Tr. 2:150. Mr. DeLong made no determinations regarding the mastic. Tr. 2:150.

On March 26, 1997, Mr. DeLong met with Fort Jackson personnel and suggested that additional wipe samples be collected at the HVAC intakes and vents to determine contamination. Complainant's Exhibit 1. He asked Fort Jackson for a letter stating how Fort Jackson proposed to proceed concerning clean up and abatement. Complainant's Exhibit 1. Fort Jackson prepared and submitted a clean-up and abatement plan to SCDHEC, which they reviewed and approved. Tr. 2:150. All of the material was re-bagged and placed in can or tins and sealed. Tr. 2:151. Essentially, after the arrival of

Mr. Fairleigh on March 20, 1997, Fort Jackson complied with all of the requests, suggestions and guidance from SCDHEC. Tr. 97.

Fort Jackson's Environmental Management Office (EMO) has overseen its environmental compliance activities. At the time of the violations, this office was part of the Directorate of Pubic Works (DPW). As part of agency reorganization to achieve greater efficiencies, the DPW has subsequently been merged with the Directorate of Logistics (DOL) to form the Directorate of Logistics and Engineering (DLE). Stipulation 37. The EMO was responsible for training, advice and inspections related to environmental compliance activities under federal environmental statutes, including but not limited to concerning the Clean Air Act (including the Asbestos NESHAP), Clean Water Act, the Emergency Planning and Community Right-to-Know Act, the Resource Conservation and Recovery Act, and the National Environmental Policy Act. Stipulation 38. The EMO is one of three offices within the Environmental and Natural Resources Division (ERND) of the DLE. Tr. 2:142. Mr. Burghardt is, and was at the time of the violations, the Chief of the ENRD. At the time of the violations, Mr. Burghardt reported to the DPW, Lieutenant Colonel Wall. Tr. 2:144. There are six federal employees and one contract employee within the EMO. Tr. 2:142. The EMO is somewhat of a consultant because they do not have the manpower to operate all the environmental systems and programs. Tr. 2:142. In regard to asbestos management, the office provides guidance and documentation of the requirements. Tr. 2:143. The EMO is funded with "fenced" funds, *i.e.* funds that Fort Jackson cannot reprogram for other purposes. Tr. 2:111. The annual amount for this office is approximately $6 million. Higher headquarters controls the number of positions and whether they will be funded. Tr.

2:111-112, 138. According to Mr. McDowell, a larger staff in the EMO or additional environmental funding would not have prevented these violations. Tr. 2: 158. They essentially resulted from the failure to follow established procedures. Tr. 2:158 In the opinion of Mr. Lewis Bedenbaugh, the Director of the Central Midlands District of SCDHEC in which Fort Jackson is located, Fort Jackson has been cooperative and has a desire to comply with environmental laws. Tr. 2:173-174.

Lieutenant Colonel Wall was eventually disciplined as a result of theses violations. Although the Commanding General initially wanted to relieve Lieutenant Colonel Wall, Colonel Nahrwold defended him and recommended a letter of admonition, a reprimand instead. Tr. 2:120. At that time Colonel Nahrwold believed Lieutenant Colonel Wall to be a committed, intelligent, talented officer whose performance to that point had been one placing soldiers first and trying to improve their quality of life. Tr. 2:120. Colonel Nahrwold thought that having been burned by his lack of judgment and failure to provide the kind of guidance oversight the project warranted, Lieutenant Colonel Wall would better understand the ramifications and ensure that the lesson learned permeated the entire engineering organization. Tr. 2:120. Although Colonel Nahrwold did not know how Lieutenant Colonel Wall's guidance was diluted or distorted as it passed through on its way to the drill sergeant supervising the activity, he and the Command felt it was his responsibility and it was more appropriate to deal with him rather than the subordinate soldiers.[7] Tr. 2:121. The letter of admonition went forward to be retained locally, with the possibility of it being filed in his official military files if

[7] Although exactly what Lieutenant Colonel Wall exactly advised is unclear, he did accept responsibility for the violations. At some time after the violations, he Mr. McDowell, to go ahead and kick him, because he knew what the procedure was. Tr. 2:158.

there was a recurrence of a similar nature. Tr. 2:122. The Commanding General was appalled at Lieutenant Colonel Wall's lack of judgment. Tr. 2:128. In the letter Lieutenant Colonel Wall was chastised for the risk that he put the soldiers and contract workers who were working in the facility, and the adverse impact on the mission. Tr. 2:128. In Colonel Nahrwold's view, this was not a slap-on-the-wrist letter. Tr. 2:128. The letter of admonition was not the only personal adverse consequence for Lieutenant Colonel Wall. Colonel Nahrwold had originally planned to make Lieutenant Colonel Wall the Director of the new Directorate of Logistics and Engineering (DLE), which was being formed as the result of the merger of the DOL and DPW. Tr. 2:123. In the wake of the asbestos violations, Colonel Nahrwold decided to place the DLE under the leadership of the civilian director of the DOL, and making Lieutenant Colonel Wall his deputy. Tr. 2:123. This decision caused Lieutenant Colonel Wall discomfort and Colonel Nahrwold eventually removed him from the Deputy DOL position and placed him under him as a Deputy Garrison Commander to allow a smoother merger of the two organizations. Tr. 2:123. Recognizing his future in the Army was limited, Lieutenant Colonel Wall submitted paperwork for retirement shortly after the assignment as Colonel Nahrwold's Deputy. Tr. 2:124.

On June 4, 1997, the South Carolina Department of Health and Environmental Control issued a Notice of Violation and Notice of Enforcement Conference to Respondent related to the removal of tile from Building 5422 on March 19, 1997, and March 20, 1997. Stipulation 43; Complainant's Exhibit 1. All notices of violation are immediately reported up the chain of command. Tr. 2:126. The Army takes all notices

of violation very seriously. Tr. 2:127. It is an embarrassment and red flags pop up everywhere. Tr. 2:127.

Prior to October 20, 2000, the South Carolina Department of Health and Environmental Control referred this matter to EPA. Stipulation 44. Mr. Russell, an enforcement official with EPA Region 4 who had active oversight authority for this case, testified that the only reason for the referral from SCDHEC to EPA Region 4 was that the Respondent could not pay a fine to the State. Tr. 2:58-60.

On December 29, 2000, Mr. Hooks at EPA Headquarters concurred on the waiver of the statutory penalty cap and 12 month time limit contained in Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), in this matter. Stipulation 45; Complainant's Exhibit 6. However, as already discussed, the characterization of "concurrence" remains a matter in dispute, as well as the subject of a motion to dismiss based upon Respondent's contention that the case was not properly referred.

On February 20, 2001, the United States Department of Justice approved the waiver of the statutory penalty cap and 12 month time limit contained in Section 113(d)(1) of the Clean Air Act, 42 U.S.C. § 7413(d)(1), with respect to this matter. Stipulation 46; Complainant's Exhibit 5.

At no time has Fort Jackson ever denied the violations. Tr. 2:127.

II.

Motion to Dismiss for Failure to Present a *Prima Facie* Case

A. The Complainant failed to prove that the Administrator, or a properly delegated official acting on behalf of the Administrator, made an "appropriateness determination" in this case, as required by the Clean Air Act §113(d)(1).

The Complainant asserts Complainant's Exhibit 6, coupled with supplemental documents filed (circa 2/27/03) in response to the Respondent's motion to dismiss, together establish that the statutory "appropriateness determination" to proceed in the case was made by an official of the U.S. Environmental Protection Agency (EPA), with properly delegated authority to act on behalf of the Administrator in such matters. Respondent concedes that Mr. Craig E. Hooks, who signed Complainant's Exhibit 6, then served as the Director of the EPA's Federal Facilities Enforcement Office, an office that is subordinate to the Headquarters, EPA, Office of Enforcement and Compliance Assurance. Respondent further concedes that the supplemental documentation provided includes an excerpt from a larger volume of documents collectively referred to as the "Delegation Manual," more specifically three pages that purport to evidence a delegation to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance, dated 8/4/94, pertaining to the Clean Air Act, specified as delegation #7-6-A, which at subparagraph 1.b, Authority, includes reference to the following authority:

> To determine jointly with the Attorney General in accordance with the CAA the circumstances under which a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action.

Finally, Respondent acknowledges that also within the supplemental documents provided there is included a memorandum, signed by Mr. Steven A. Herman, then the Assistant Administrator for Enforcement and Compliance Assurance, which includes a matrix (table), and between the text of the memorandum and the matrix, it is clear that Mr. Herman intends to further redelegate his authority to act in certain matters, as specified in

the memorandum and matrix, and among the specified delegations are the authority to issue Complaints. However, conspicuously absent within the supplemental documents provided by Complainant is any evidence showing when or how the Administrator personally acted in making the purported delegations in the "Delegation Manual," i.e., no reference to a transmittal or formal rulemaking action involving the Administrator for any of the delegations in the manual, or for this particular delegation, #7-6-A.

Upon closer examination of the Complainant's supplemental filing, it is noted that the item specified as delegation #7-6-A includes in subparagraph 3, Limitations, a variety of limitations on the purported delegation of authority, one of which is specified in subparagraph 3.e, as follows:

> The Assistant Administrator for Enforcement and Compliance Assurance must concur in any determination regarding the authority delegated under paragraph 1.b. [Note, this is the subparagraph quoted above, pertaining to joint determinations between the Administrator and Attorney General.]

Therefore, assuming, *arguendo*, that the Complainant is afforded yet another opportunity to demonstrate the manner in which the Administrator personally approved delegation #7-6-A, the Complainant's case remains fatally defective, in that nowhere in the documents presently before the Court has there been a showing of concurrence of the Assistant Administrator for Enforcement and Compliance Assurance (Mr. Herman). The document that is a matter of record, Complainant' Exhibit 6, signed by Mr. Hooks, makes reference to an appropriateness determination that was made by the Regional Administrator; however, there is no mention of any action by the Assistant Administrator for Enforcement and Compliance Assurance. Moreover, there also is no evidence in the record to demonstrate that a proper appropriateness determination was made by the Regional Administrator, EPA Region 4 (although, it is possible that such a determination

was included in the enclosure to Complainant Exhibit 6, an "enforcement sensitive memorandum" that was never provided to the Respondent, but apparently was provided to the Department of Justice as part of a staffing package). Again, assuming, *arguendo*, a proper delegation in the first instance (as specified in #7-6-A) from the Administrator to the Regional Administrators and the Assistant Administrator for Enforcement and Compliance Assurance, then a limitation was imposed on that delegated authority, which in turn equates to a non-delegable function, i.e., for those non-routine matters requiring a joint appropriateness determination by the Administrator and the Attorney General, the ability to act is reserved to the Assistant Administrator for Enforcement and Compliance Assurance, and his or her advance concurrence is required.

Although the complete Delegation Manual is apparently not available to the general public via the Internet, the Respondent did manage to secure an additional excerpt titled, "Introduction to the Delegations Manual (dated 2/22/95)," consisting of 5 pages that are appended to this brief as Appendix A. In particular, Respondent directs the Court's attention to subparagraph 4.e(3):

> (3) "must obtain advance concurrence": except where specified otherwise, the delagatee must obtain the written agreement of the other official (s) named before exercising the authority.

Therefore, since the Complainant failed to demonstrate that the necessary concurrence of the Assistant Administrator for Enforcement and Compliance Assurance was obtained, in writing, prior to proceeding to exercise jurisdiction in this case, the Complaint is not properly filed for adjudication. This jurisdictional defect merits dismissal as a matter of law based upon Complainant's failure to establish a *prima facie* case, consistent with 40 C.F.R. Part 22, subsection 22.20.

At the hearing, the Court queried counsel for the Respondent as to what difference it makes whether the Complaint was properly brought, suggesting that the defect could probably be easily corrected and the case could be refiled in a matter of months, Tr. 16. At this time, Respondent further elaborates on the response provided during the hearing, Tr. 117. Clearly, if the Court dismisses without prejudice, the Complainant could refile, assuming the requisite approvals to go forward are forthcoming; however, the ensuing delay might lead to a different decision on the part of the Complainant or its higher headquarters leadership officials. Moreover, the Respondent would have an additional opportunity to seek an alternative disposition, whether through discussions with officials at the Regional EPA level, the EPA Headquarters level, or perhaps with the Department of Justice. Finally, having heard all the evidence, the Court has an opportunity to rule with even greater force by exercising its discretion to dismiss this case "with prejudice," sending a message to Complainant that greater care should be taken in the handling of "extraordinary cases."

What makes this case "extraordinary?" Certainly not the facts, as unfortunately asbestos violations of this nature are still rather common throughout the regulated community and are generally handled as routine enforcement matters by States with the requisite delegation of authority to administer an enforcement program on behalf of the EPA. Rather, what is unusual about this case is the fact that it is brought by Complainant as a referral from the State of South Carolina, with the only justification for the referral, in evidence, being that Respondent refused to pay a punitive fine to the State of South Carolina based upon assertion of the lack of a clear waiver of sovereign immunity under the Clean Air Act, consistent with legal interpretations of the Department of Justice (see

Appendix B) and policy requirements of the Department of the Army, Respondent's Exhibit 6.

Even more unusual, is the fact that Complainant initiated this Complaint despite the fact that it originated in March 1997, well before the issuance of a Department of Justice legal opinion issued in July 1997, Complainant's Exhibit 12, and the follow-on EPA policy guidance issued in October 1998, Complainant's Exhibit 13, which states the following in Section VI, Penalties:

> If violations occurred prior to July 16, 1997, and are ongoing, EPA could assess penalties for the violations from July 16, 1997 until correction of the violation. Moreover, EPA can require correction of and, in some cases, may seek penalties for violations that occurred prior to July 16, 1997. If a Region believes that seeking penalties for violations occurring prior to July 16, 1997, is warranted, the Region should submit a justification to the Director of the Federal Facilities Enforcement Office.

The clear implication of the quoted language from the policy, signed by Mr. Herman, October 9, 1998, is that the EPA is not particularly interested in reaching back for cases that originated prior to July 16, 1997, i.e., before the issuance of the opinion by Department of Justice that concluded that EPA may assess administrative penalties against Federal facilities, and thus such cases are to be screened even before being presented to the Assistant Administrator for Enforcement and Compliance Assurance for consideration as to "appropriateness." Therefore, the implementing policy establishes an extra step for "selective prosecution," i.e., complaints could be pursued on a case-by-case basis, and presumably, only truly egregious cases would result in the filing of an administrative complaint. Granted, Respondent is reading additional intent into the quoted language, but Respondent urges the Court to consider the reasonableness of Respondent's interpretation in the overall context of whether Respondent has been

treated fairly in this case. Recall the testimony of Mr. Walker, offered by Complainant as an expert with regard to prosecuting violations, and he could not recall a single other case in which the EPA sought to impose a civil administrative penalty against a Federal facility for violations that originated before July 16, 1997, Tr. 210-211. Again, note that Respondent worked cooperatively with the State regulatory officials and took immediate action to correct the violations—the only issue that caused this case to be referred for enforcement by the Complainant was Respondent's refusal to pay a punitive fine, consistent with well established legal interpretation of the Department of Justice and the policy of the Department of the Army that is directly related to the Department of Justice's legal position on behalf of the United States government.

Respondent respectfully urges the Court to dismiss the Complaint with prejudice, or in the alternative, to dismiss without prejudice, but in either case Respondent asserts a right to dismissal as a matter of law, based upon the jurisdictional defect noted and Complainant's failure to establish a *prima facie* case.

B. Proposed Conclusions of Law (Motion to Dismiss)

Concerning Respondent's Motion to Dismiss Based Upon Complainant's Failure to Establish a *Prima Facie* Case.

1. The Complaint is brought under provisions of the Clean Air Act, 42 U.S. § 7413(d)(1), authorizing the Administrator to assess civil penalties through an administrative process, as established in 40 CFR Part 22.

2. Rule 22.24 establishes that Complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the Complaint, and that the relief sought is appropriate.

3. In addition to all of the procedural requirements set forth in the administrative process promulgated in 40 CFR Part 22, since the violations at issue originated more than twelve months prior to the initiation of the Complaint, Complainant must also meet a statutory requirement of showing that there was a joint determination by the Administrator and the Attorney General concerning the appropriateness of pursuing an administrative penalty action.

4. The Attorney General has executed a proper delegation of authority to the Assistant Attorney General in charge of the Land (*sic* Environment) and Natural Resources Division, to act in his behalf with respect to any matter in which the U.S. Environmental Protection Agency is a party, as promulgated at 28 CFR Part 0, Subpart M, § 0.65a.

5. On February 20, 2001, Mr. John C. Cruden, the Acting Assistant Attorney General of the Environment and Natural Resources Division, concurred in a request for waiver to proceed, in accordance with 42 U.S. § 7413(d)(1), and Complainant's Exhibit 5 documents the required action by the Attorney General in this matter.

6. The delegation of authority from the EPA Administrator to a subordinate acting on her behalf is documented in the *EPA Delegation Manual*, at subparagraph #7-6-A (post-hearing submission by Complainant, filed February 27, 2003), in which the authority to file administrative complaints under provisions of the Clean Air Act, including matters governed by 42 U.S. § 7413(d)(1), is delegated to Regional Administrators and the Assistant Administrator Assistant Administrator for Enforcement and Compliance

Assurance; however, within subparagraph 3 of delegation #7-6-A are enumerated limitations, and subparagraph 3.e specifies that in a case in which there is a requirement for a joint determination by the Administrator and the Attorney General, the Assistant Administrator Assistant Administrator for Enforcement and Compliance Assurance must concur.

7. The limitation term, "must concur," is further defined in the Introduction to the Delegations Manual, at subparagraph 4.c(3), as follows:

> "must obtain advance concurrence": except where specified otherwise, the delegatee must obtain the written agreement of the other official(s) named before exercising the authority.

Thus, even though the Assistant Administrator for Enforcement and Compliance Assurance subsequently executed a memorandum to redelegate his delegated authority to several subordinates (post-hearing submission by Complainant, filed February 27, 2003), the limitation language in the *EPA Delegation Manual*, delegation #7-6-A, serves to make the concurrence of the Assistant Administrator for Enforcement and Compliance Assurance in matters requiring a joint appropriateness determination a nondelegable duty.

8. There is no evidence in the Record to prove that the Assistant Administrator for Enforcement and Compliance Assurance concurred, in writing, in the appropriateness determination made by the Regional Administrator, EPA Region 4, before the Complaint was filed; therefore, the Complaint is not properly referred and this constitutes a fatal jurisdictional defect. Moreover, there is no evidence in the Record to prove that an appropriateness determination was made by the Regional Administrator, EPA Region 4, although CE 6, implies that such a determination was made by citing to an ". . . enclosed enforcement sensitive memorandum from Region IV, EPA believes that an

Enough time and scarce government resources have been wasted in pursuing this administrative action, and it is time for each party to move on to more important matters.

So ordered.

III.

BRIEF ON THE MERITS

A. THE TWO STATUTORY BUSINESS CRITERIA DO NOT APPLY TO FEDERAL AGENCIES, INCLUDING MILITARY INSTALLATIONS BECAUSE THEY ARE NOT BUSINESSES.

CAA Section 113 (e)(1), provides, in relevant part:

> (e) Penalty assessment criteria.
> (1) In determining the amount of any penalty to be assessed under this section or section 304(a) [42 USCS § 7604(a)], the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. ....

The statutory criteria include two relating to "business": "size of business," and "the economic impact of the penalty on the business." The two are corollaries.

Federal agencies, including the Department of Defense, the Department of the Army, and Respondent, are not "businesses" for purposes of CAA §§113(e) and 118(a).

Congress did not intend for EPA to apply the size-of-business penalty criterion against Federal facilities such as Respondent. To begin with, the statute does not mandate or require the consideration or application of each of the criteria listed in the statute. It provides that "the Administrator or the court, as appropriate, shall take into consideration" the listed criteria (emphasis added).

could have used the term "person" (defined in the CAA to include federal agencies) or simply used the term "violator." In contrast, however, and presumably for good reason, Congress chose the phrase "size of business." It is basic in construing a statute that the plain meaning governs and each of the words selected by Congress must be given effect.

The conclusion that Congress intended the broad dictionary definition of the word "business" lack support for at least two reasons: (1) in reference to the "the violator's full compliance history and good faith efforts to comply" criterion, Congress chose the broader word "violator;" and (2) the use of the term in the "the economic impact of the penalty on the business" criterion clearly gives it an economic context.

The principles underlying the size-of-business criteria work for the business community as Congress intended. But mechanically applying these criteria to U.S. Army facilities achieves absurd results because it assumes that installations can somehow manage their portfolio, raise additional revenues by selling tanks and helicopters, by laying off employees, by mortgaging real estate, or by passing the costs of doing business on to the general public. This completely ignores the fact Fort Jackson must get its funding from Congress and is not at liberty to sell public assets under its stewardship to raise the money either to employ more environmental or other personnel, or pay a penalty.[9]

The Complainant's expert on EPA enforcement policies, Mr. Michael J.Walker, asserts the Army operates under a number of businesslike concepts,[10] specifically

[9] In fact, Fort Jackson, holds legal title to no property, real or personal. Title to real property is held in the name of the United States. See Title 10, U.S. Code, Chapter 159 (§§ 2661-2696). All acquisitions of goods and services can only be made by a warranted contracting officer in the name of the United States of America. See FAR § 1.601, 48 C.F.R. § 1.601. Standard contract forms identify the government contracting party as the United States of America, see e.g. SF 26, 48 C.F.R. § 53.301-26.

[10] At one point Mr. Walker refers to an Army promotional website as claiming to be a business. Tr. 217.

referencing procurement, assuming it procures things looking for business opportunities to maximize the taxpayer's dollar. Tr. 216. Complainant's counsel sought budget information on Fort Jackson's higher headquarters and the entire Army. Tr. 2: 133. Mr. Walker describes how the EPA looks to the overall capital assets of a federal agency. Tr. 169. If the United States Government were analogized to a large corporation, such as General Electric, the shareholders would the citizens and taxpayers, the board of directors would be the Congress and the officers and employees would be the officers of the Executive Branch. The various Federal agencies and their subordinate units would be the equivalent of operating divisions or subsidiary corporations. According to Mr. Walker, "size of business" is taken into consideration in order for a penalty to mean something. Tr. 167. Would an increase in the amount of penalty against a General Electric subsidiary really mean something if the penalty was merely returned to General Electric's corporate coffers? Such a return to the corporate treasury is the result when the EPA imposes a penalty upon a federal agency.[11] In reality the imposition of a civil penalty against a federal agency is a budget decrement. There is no impact on revenues, profits, liabilities, net worth or any economic matter. Insofar as the corporate treasury (U.S. Treasury), or the shareholders (citizens and taxpayers) are concerned, it does not make any difference whether the penalty, or budget decrement, is imposed on a large or small federal facility or agency.

Notwithstanding the efforts and desires of political appointees and other agency executives to do so, the Army does not, and is not permitted to, operate as a business.[12]

[11] 31 U.S.C. § 3302(b) requires the deposit of miscellaneous receipts into the Treasury.
[12] If a profit were somehow earned, and it caused the Agency's budget to exceed the amount appropriated by Congress, the Agency would likely face some sort of recoupment action due to an unlawful augmentation, in violation of 31 U.S.C. § 3302(b) and § 1301(a).

For example, the Congress has infused the federal procurement process with numerous social programs and goals, which foster Congressional objectives unrelated to efficient business operation.[13] For example, Fort Jackson, in compliance with the Randolph-Sheppard Act,[14] was recently required to award a contract for food services to the South Carolina Commission for the Blind at a proposed cost of more than $8 million than the other technically acceptable offeror. *Cantu Services, Inc.*, B-289666.2, B-289666.3, Nov. 1, 2002, 2002 CPD ¶ 189, 2002 U.S. Comp. Gen. LEXIS 197. Contracting officers are frequently constrained from making businesslike decisions and purchases. In addition, unlike a business, a Federal agency must contract with any contractor unless it has been barred from Federal contracts, a difficult process.[15] Another example where Federal agencies cannot act like businesses is in terminating employees. Federal employees are granted significantly more "due process" rights than business employees.[16]

The experience and testimony of Colonel Nahrwold is relevant to this issue. After leaving Fort Jackson in 1998, Colonel Nahrwold served as the executive officer, chief of staff, to the Assistant Secretary of the Army for Installations and Environment, the Honorable Maylan Apgar IV. Tr. 2:86. Mr. Apgar's office had responsibilities for establishing policy in the areas of installation management, environment, occupational health and safety. Tr. 2:86. Colonel Nahrwold was selected to serve as a source of information from the grassroots implementation of these policies, to give Mr. Apgar a perspective on life at the installation level. Tr. 2:86. As part of the selection process, Mr. Apgar had Colonel Nahrwold review four articles Mr. Apgar had published in the

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[13] See FAR Subchapter D, 48 C.F.R. Subchapter D.
[14] 20 U.S.C. § 107b; 34 C.F.R. §395.33(a).
[15] See FAR Part Subpart 9.4, 48 C.F.R. Subpart 9.4.
[16] See Title 5, U.S. Code.

Harvard Business Review that talked to the management of real property in the private sector, and then provide his opinion as to their applicability to the Army. Tr. 2:89. Colonel Nahrwold advised Mr. Apgar that an underlying premise he held did not attain to the Army: who controls the portfolio. Tr. 2:89. The recent Base Realignment and Closure (BRAC) programs are illustrative. The Army makes recommendations as to how it can achieve greater efficiencies, but it requires Congressional approval first to proceed. Tr. 2:91. For example, the army's largest drill sergeant school is at Fort Jackson and there are smaller versions at Fort Benning, Georgia and Fort Leonard Wood, Missouri. Tr. 2-91. The Commanding General TRADOC decided he could achieve greater efficiencies by consolidating the three schools into one at Fort Jackson, but was quickly stopped by members of Congress from Georgia and Missouri. Tr. 2:91. Although Colonel Nahrwold believes Mr. Apgar did not initially accept the notion Congress rather than the Secretary manages the portfolio, he eventually understood it and often expressed his frustration by saying, "if this were only a business." Tr. 2:90. One of the programs initiated by the Mr. Apgar was the Residential Communities Initiative (RCI), for the purpose of renovating over 80,000 sets of family quarters on military installations worldwide. Tr. 2:88. In this program, community developers are selected and they come in, invest their own resources in the renovation or new construction of family housing on the installation. Tr. 2:92. The amount of money normally paid to soldiers if they have to live off of the installation is paid to the developer to amortize the investment over time. Tr. 2:93. This arrangement is necessary because the amount of money necessary to improve the quality of on-base housing is not available in the budgets. Tr. 2:93. The RCI program, as well as ongoing efforts to privatize utilities, are examples of efforts to

take a more responsible management approach, and one might reasonably argue these are business oriented initiatives; however, both of these privatization initiatives required Congressional approval prior to implementation

Ordinary understanding of the term "business" in the context of § 113(e) leads one to the conclusion these criteria are not applicable to federal facilities such as Fort Jackson. One administrative law judge has apparently drawn that conclusion. *Lake County, Montana*, EPA Docket No. CAA-8-99-11, 2001 EPA ALJ LEXIS 132, * 64 (ALJ, July 24, 2001)(The County is a municipality under the Act. . . and no adjustments for the size of business or impact of the penalty on the business are warranted.").

B. IF THE "SIZE OF BUSINESS" AND "THE ECONOMIC IMPACT OF THE PENALTY ON THE BUSINESS" CRITERIA ARE APPLICABLE TO FORT JACKSON, THE COURT SHOULD DEPART FROM THE EPA PENALTY POLICIES.

Whether or not the Court decides the "size of business" criteria are applicable, the court should depart from the EPA Penalty Policies, at least application of the size of violator factor, because they are predicated on traditional business considerations, profit, net worth, etc., which are not really appropriate for Federal agencies, or at least Fort Jackson.

The traditional business considerations upon which the EPA policies are predicated simply do not work in federal agencies, or at least the Army and/or Fort Jackson – there is no competition or profits to be affected and soldier/employees are not motivated to do or not do something on the basis of good business practices that generate efficiencies or increase returns to shareholders.